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15  
16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA  
18 WESTERN DIVISION

19 MICHAEL TERPIN,  
20 Plaintiff,  
21 v.  
22 AT&T Mobility, LLC; and DOES 1-  
23 25,  
24 Defendants.

25 Case No. 2:18-cv-06975-ODW-KS  
26 [Assigned to The Hon. Otis D. Wright II]

27 **DISCOVERY MATTER**

28 **SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION OF PLAINTIFF  
MICHAEL TERPIN RE ORDER  
RESOLVING DISCOVERY ISSUES  
IN DISPUTE**

[Central District Local Rule 37-2.3]

Hearing Date: June 8, 2022  
Hearing Time: 10:00 a.m.  
Discovery Cutoff: January 30, 2023  
Pretrial Conference: April 10, 2023  
Trial: May 2, 2023  
Judge: Hon. Karen L. Stevenson

1 Plaintiff Michael Terpin (“Plaintiff”) hereby files his Supplemental  
 2 Memorandum in support of his discovery motions pursuant to Local Rule 37-2.3.

3 **I. ISSUE NO. 1: AT&T SHOULD PRODUCE RELEVANT  
 4 DOCUMENTS FROM JANUARY 1, 2015**

5 AT&T’s opposition to producing documents relating to unauthorized SIM  
 6 Swaps from January 1, 2015 (rather than January 1, 2016) does not rest on any  
 7 reasoned basis. Nor has AT&T submitted evidence that would establish its claim  
 8 that such a production would be disproportionate, particularly since it involves only  
 9 one additional year when AT&T noted internally that SIM swap fraud was a serious  
 10 challenge and the company was specifically put on notice by the Federal  
 11 Communications Commission (FCC) about the privacy risks posed by fraud and  
 12 identity theft.

13 Plaintiff alleges that AT&T did not adequately put in place proper  
 14 authentication and security procedures to guard against takeover of its customers’  
 15 accounts and their personal and proprietary information through unauthorized SIM  
 16 swaps. Plaintiff further alleges that AT&T’s failure to put into place such  
 17 procedures prior to Plaintiff’s SIM swap in January 2018 led to his loss of \$24  
 18 million in cryptocurrency, which constitutes not only grossly negligent conduct  
 19 subjecting AT&T to punitive damages, but also is a violation of Section 222 of the  
 20 Federal Communications Act (“FCA”).

21 The fact that AT&T identified SIM swapping in 2015 as a “hot fraud issue”  
 22 is significant even if the specific harm addressed by in 2015 may have allegedly  
 23 been different than it was in 2017 or 2018. The key element of a SIM swap is the  
 24 takeover of a customer’s account, which means the takeover of the customer’s  
 25 identity leading to potential access to personal and proprietary information. Once a  
 26 hacker is in control of a customer’s phone, the hacker gains access to a customer’s  
 27 personal and private information, including cloud-based files and two-factor  
 28 authentication messages. Most crucially, SIM swaps may allow a hacker to reset

1       passwords for cloud-based accounts, such as Microsoft or Google accounts.

2           AT&T's assessment of the risks of SIM swaps and of other methods of  
 3 identity theft in 2015 and its failure to implement proper security and authentication  
 4 procedures is directly relevant to the foreseeability of the harm in this case,  
 5 regardless of the specific harm inflicted by SIM swap fraud. In 2015 AT&T knew  
 6 that its customers' accounts and identities were being taken over by unauthorized  
 7 individuals and that the security of its customers' private and proprietary  
 8 information was at risk. As Exhibit A makes clear, preventing takeovers of mobile  
 9 phones through unauthorized SIM swaps implicated AT&T's fundamental duty as a  
 10 "common carrier" under Section 222(a) of the FCA to protect its customers'  
 11 personal and private information. *See In the Matter of Terracom, Inc. et al.*, 29  
 12 FCC Rcd. 13325 (2014), 2014 WL 5439575, \*4-\*5 (Section 222(a) protects not  
 13 only Customer Proprietary Network Information (CPNI), but a broad range of  
 14 customers' personal information, including "all types of information that should not  
 15 be exposed widely to the public, whether because that information is sensitive for  
 16 economic reasons or for reasons of personal privacy").

17           In 2015 AT&T's regulator put it on notice of the dangers of identity fraud of  
 18 its customers. On April 8, 2015 the FCC fined AT&T a record \$25 million for  
 19 violating Section 222 of the FCA by allowing its employees to hand over to thieves  
 20 the personal information of almost 280,000 customers. *See In the Matter of AT&T*  
 21 *Services, Inc.*, 30 FCC Rcd. 2808. According to the April 8, 2015 Order, AT&T  
 22 had violated the fundamental purpose of its obligations under Section 222, which is  
 23 to "*ensure that consumers can trust that carriers have taken appropriate steps to*  
 24 *ensure that unauthorized persons are not accessing, viewing or misusing their*  
 25 *personal information.*" *Id.* (Emphasis added.) The FCC ordered AT&T to take  
 26 "every reasonable precaution to protect their customers' data." *Id.*

27           AT&T thus takes an unduly narrow view of the issues of this litigation,  
 28 particularly regarding AT&T's violations of the FCA and its gross negligence in

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1 failing to protect its customers. Plaintiff is entitled to discovery regarding AT&T's  
 2 efforts in 2015 to protect its customers against fraud and identity theft, including  
 3 unauthorized SIM swaps.

4 **II. ISSUE NO. 2: AT&T SHOULD EXCHANGE SEARCH TERMS  
 5 FOR ESI TO ALLOW THE PARTIES TO MEET AND CONFER  
 6 REGARDING THE PRODUCTION OF DOCUMENTS.**

7 Before AT&T had produced a single document in this matter, Plaintiff  
 8 requested that the parties cooperate to exchange search terms for electronically  
 9 stored information ("ESI") so that they could meet and confer regarding the  
 10 adequacy of such terms. Although the exchange of search terms is, of course, not  
 11 obligatory in every single case, the exchange of search terms is particularly  
 12 appropriate here because AT&T has narrowed the number of custodians and  
 13 attempted to narrow the date range of the production and has shown that it takes an  
 14 unduly narrow view of the issues of the case. Without producing the search terms,  
 15 Plaintiff is inevitably in the dark as to the basis for AT&T's searches of ESI—  
 16 which is precisely the reason why it is common that courts require exchange of  
 17 search terms. *See, e.g., In re Seroquel Products Liability Litigation*, 244 F.R.D.  
 18 650, 662 (M.D. Fla. 2007) ("[W]hile key word searching is a recognized method to  
 19 winnow relevant documents from large repositories, use of this technique must be a  
 20 cooperative and informed process. . . .") This exchange is an inherent component  
 21 of the adversarial system yet, in this case, AT&T rejected engaging in even the  
 22 initial steps of this "cooperative and informed process" before documents were  
 23 produced, thus deliberately leaving Plaintiff ignorant and forcing Plaintiff to bring  
 24 this motion.

25 Now that AT&T's document production is a *fait accompli*, AT&T maintains  
 26 that Plaintiff must show that its document production is defective to receive  
 27 AT&T's search terms. Not only would this reward AT&T for its failure to be  
 28 transparent and cooperative, but it is not supported by case law. *See Apple, Inc. v.*

1       *Samsung Elecs. Co.*, 2013 WL 1942163, at \*2 (N.D. Cal. May 9, 2013) (it is  
 2 unnecessary for a party to demonstrate that the other party’s “production is  
 3 deficient” to compel a party to exchange search terms). Moreover, because AT&T  
 4 has not produced its search terms, AT&T has deliberately made it impossible for  
 5 Plaintiff to assess the adequacy of its production. Although AT&T states in the  
 6 joint stipulation that it is “simply not true” that AT&T has refused to produce  
 7 documents relating to unauthorized SIM swaps on the grounds that they did not  
 8 involve theft of cryptocurrency, Plaintiff cannot assess the truth of this assertion.  
 9 AT&T’s approach to this case deprives Plaintiff of the opportunity to meet and  
 10 confer, if necessary, to challenge the terms.

11       Cases cited by AT&T support the proposition that disclosure of search terms  
 12 and the subsequent discussion of those terms often serves as a reasonable basis for  
 13 resolving issues involving discovery of ESI. In *Jensen v. BMW of North Am., LLC*,  
 14 328 F.R.D. 557, 564 (S.D. Cal. 2019), the plaintiff had suggested search terms, the  
 15 parties had discussed the appropriateness of the terms, and the court decided the  
 16 parties’ dispute over the terms. In contrast, AT&T here did not even engage in the  
 17 fundamental step of disclosing its search terms so that the parties can discuss the  
 18 terms (and, if necessary, have the Court adjudicate any dispute).<sup>1</sup> Moreover,  
 19 AT&T’s refusal to provide the search terms (or any explanation of the search terms  
 20 used for such key terms as “unauthorized SIM Swap”) is akin to the refusal of the  
 21 defendant in *Micromet AG v. Cell Therapeutics, Inc.*, 2006 WL 8454650 \*2  
 22 (W.D.Wash. 2006) (cited by AT&T) “to identify even a simple explanation about  
 23 the search terms used pertaining to the search for [a] key term [in the litigation] . . .  
 24 .”

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25  
 26       <sup>1</sup> *Fish v. Air & Liquid Systems Corp.*, 2017 WL 697663 (D.Md. 2017) seems to be  
 27 included by AT&T because it contains the phrase “discovery on discovery.” In fact  
 28 *Fish* was not an ESI case, but instead addressed the question of whether the  
 methodology used to compile historic documents relating to asbestos was the  
 proper subject of a Rule 30(b)(6) deposition.

1           AT&T makes the false claim that exchange of search terms for ESI is  
 2 “discovery on discovery.” In fact, search term exchanges are a well-accepted and  
 3 standard practice for discovery of ESI because they promote transparency and allow  
 4 the parties to assess the reasonableness of searches. Moreover, AT&T is only able  
 5 to frame the issue as “discovery on discovery” because it refused to exchange terms  
 6 and plowed ahead with producing documents, thus accomplishing the *fait accompli*  
 7 referenced earlier. This is patently contrary to the “best practice” for discovery of  
 8 ESI. As the court stated in *Williams & Cochrane, LLP v. Quechan Tribe of Fort*  
 9 *Yuma Indian Reservation*, 2020 WL 2747117, \*7 (S.D.Cal. 2020), “[w]hen an ESI  
 10 search is required for document production, the best practice is for the parties to  
 11 cooperate to reach an agreement regarding custodians and search terms to inform  
 12 the document production.” As the court further states, “[o]f course, agreement will  
 13 not always be possible, and a party may use discovery to learn about its opponent's  
 14 record search parameters, either before or after the search has been conducted.” *Id.*,  
 15 citing *Baranco v. Ford Motor Co.*, 2018 WL 9869540 \*1 (N.D.Cal. 2018)  
 16 (rejecting that discovery into search parameters infringes work product and  
 17 attorney-client privilege and noting that “the purpose of meeting and conferring  
 18 *before* documents are collected and produced is to minimize the risk of an  
 19 inadequate search” and to avoid the risk of after-the-fact disputes”).

20           Respectfully submitted,

21           DATED: May 25, 2022

22           GREENBERG GLUSKER FIELDS  
 23 CLAMAN & MACHTINGER LLP

24           By: /s/Timothy J. Toohey

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